



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC JR APPL. NO. 4 OF 2017
IN THE MATTER OF AN APPLICATION
BY NAOMI WANJIKU MUTURI
FOR AN ORDER OF PROHIBITION AGAINST
THE DIRECTOR OF SURVEY, LAIKIPIA COUNTY
SURVEYOR AND LAIKIPIA COUNTY LAND REGISTRAR
AND
IN THE MATTER OF SECTIONS 16, 17, 18
AND 19 OF THE LAND REGISTRATION ACT

REPUBLIC.....APPLICANT

-VERSUS-

THE DIRECTOR OF SURVEYS.....1ST RESPONDENT

THE LAND SURVEYOR, LAIKIPIA COUNTY.....2ND RESPONDENT

THE LAND REGISTRAR, LAIKIPIA COUNTY.....3RD RESPONDENT

JUDGMENT

1. Pursuant to the leave granted to the *ex parte* applicant on 16th October, 2017 to apply for prohibition, the *ex parte* applicant, Naomi Wanjiku Muturi, brought the notice of motion dated **2nd November, 2017** seeking an order of prohibition to prohibit the Director of Surveys and the Laikipia County Surveyor from doing any correctional or amended survey on the parcel of land known as title number **Nanyuki Municipality Block 6/225** (Suit Property) unless such amendment or correctional survey is strictly in conformity with the approved Part Development Plan (PDP) number 109 of 1982 and an order of prohibition to prohibit the Land Registrar Laikipia County from registering or in any way acting upon any amendment or correction of boundaries on the suit property as currently subsisting unless such amendment and/or correction is in conformity with the Approved Part Development plan number 109 of 1982.

2. The application is premised on the following grounds:-

- (i) That the *ex parte* applicant is the registered proprietor of the suit property;
- (ii) That the suit property was originally offered as unsurveyed plot number 16 Nanyuki township;
- (iii) That the original plan for the suit property, to wit LD 25859/XII/56B was subsequently replaced by PDP number 109 of 1982. According to the *ex parte* applicant, the position and boundaries of the suit property remained unchanged.

3. It is the applicant's case that another PDP to wit FR/444/185 which altered the boundaries and size of the suit property was prepared and used to prepare a deed plan for the property and for registration of the suit property as Nanyuki/ Municipality Block 6/225.

4. According to the *ex parte* applicant, it has emerged that the PDP referred to in paragraph (3) above had not been approved. Consequently, the director of surveys has sought to correct the error in that PDP by reverting to the previous PDP to wit PDP No.109 of 1982.

5. The *ex parte* applicant alleges that the Director of Surveys, through his agents, the Laikipia County Surveyor and M/S Opiyo and Associates, are implementing the correction by obliterating or shifting the suit property to the adjacent Rikii river with a view of accomodating interests not captured in PDP No. 109 of 1982.

6. Apprehensive that the intended correction will invariably entail a re-survey of her plot with the possibility of occasioning a change in the size and boundaries thereof and a possible cancellation and fresh registration of her plot, the *ex parte* applicant requested the Director of Surveys to give her an undertaking to the effect that her interest as captured in PDP No.109 of 1982 will not be interfered with which request the Director of Surveys ignored.

7. In support of the averments contained in the application the *ex parte* applicant relies on the following documents:-

- (a) Certificate of lease for Nanyuki Municipality Block 6/225
- (b) Letter of allotment for unsurveyed plot 16 Nanyuki Township
- (c) Survey map
- (d) A letter dated 8th May, 2017 by Opiyo and Associates
- (e) A letter dated 7th April, 2017 by Director of Survey.
- (f) A letter dated 17th May, 2017 by Mwangi Kariuki & Co. Advocates.

8. The respondents through the Office of the Attorney general filed a notice of appointment of advocate but filed no response to the case. For that reason, the matter proceeded undefended.

9. When the matter came up for hearing counsel for the *ex parte* applicant relied on the pleadings as filed.

Analysis and determination

10. From the pleadings filed, the *ex parte* applicant seeks to restrain the respondents in carrying out their respective mandates unless the mandates are executed in accordance with a certain document to wit PDP No. 109 of 1982. The *ex parte* applicant's application is premised on the apprehension that in discharge of their mandates of correcting the registration of titles effected pursuant to PDP No. FR/444/185 which has since been found to be erroneous, the respondents may interfere with the *ex parte* applicant's interest in unsurveyed plot No.16 Nanyuki Township which was allocated to her.

11. As can be discerned from the documents relied on by the *ex parte* applicant and in particular, the letter from the Ministry of Lands and Physical Planning to the District Surveyor, Laikipia District, dated 7th April, 2017 to the effect that there is an overlap between the suit property and Nanyuki/Municipality Block 227. In that letter, the department of survey is in the process of rectifying and correcting the error by inter alia cancelling the erroneous plan F/R 444/185 by M/S Opiyo Associates. Vide a letter from M/S Opiyo Associates to John Wakaba, it is acknowledged that there was an error in the survey process which led to creation of the suit property as the creation was premised on an unapproved PDP resulting in overlaps into neighbouring parcels.

12. As the *ex parte* applicant's application is premised on the fear that the exercise of correcting the apparent error in creating the title she holds may lead in loss of the title she holds, the question to answer is whether based on the said apprehension, the *ex parte* applicant has made up a case for being granted the orders sought.

13. In the case of **Republic v. Judicial Service Commission ex parte Pareno (2004) KLR 203** quoted in the case of **Republic v. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology (2008)eKLR** it was stated:

“Under the *Wendesbury* principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached the decision.”

14. From the pleadings filed in this matter, I find as a fact that the dispute relates to the apprehension by the *ex parte* applicant that the intended correction of the survey in respect of the suit property may result in loss of the *ex parte* applicant's interest in the suit property. In this regard, see the *ex parte* applicant's demand letter to Opiyo and Associates dated 7th June, 2017. Through that letter, which was copied to the County Land Surveyor and County Land Registrar, Laikipia; the *ex parte* applicant sought an undertaking that her interest in the title to the suit property will not be affected or will be preserved as it originally was under the original PDP No. 109 of 1982.

15. In the case of **Kenya National Examination Council v. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others (1997) e KLR, concerning an order of Prohibition** it was held that:-

“Prohibition is an order from the high court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure of the rules of natural justice....prohibition does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings and that it is powerless against a decision which has already been made before such an order is issued as such an order can only prevent the making of a decision”.

16. Whereas the *ex parte* applicant has genuine fears concerning the possibility of the intended correction of the error apparent in the suit property resulting in loss or interference of her interest in the suit property, this court cannot dictate to the respondents how to carry out the intended correction or how not to carry it out as by doing so it may interfere with the mandate of the respondents.

17. There being no evidence of improper exercise of the mandate of the respondents, I find the order that best commends itself in the circumstances of this case is to prohibit the respondent from violating the law concerning correcting of errors in title to land and violating the *ex parte* applicants rights to the suit property while exercising their respective mandates.

18. The *ex parte* applicant’s application only succeeds to the extent contemplated in this ruling.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 4th day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Mshila h/b for Mwangi Kariuki for the applicant

N/A for the respondents

Court assistant - Esther